1114.

SUPREME COURT OF THE UNITED STATES.

No. 88.

THE UNITED STATES, PLAINTIFF,

vs.

ELI S. PRESCOTT ET AL.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT UNITED STATES FOR ILLINOIS.

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J. & G. S. Gideon, printers.

Pleas before the honorable judges of the circuit court of the United States, for the district of Illinois, at the June term of said court, and on the fourteenth day of said term, in the year of our Lord one thousand eight hundred and forty-three, and of our independence the 67th.

Present, Hon. John McLean, presiding judge, Hon. Nathaniel Pope, judge.

THE UNITED STATES OF AMERICA,
vs.
ELI S. PRESCOTT, William B. Ogden, Mark Skinner, James H. Woodworth, John W. Eldridge, Robert P. Woodworth, Albert G. Leary, Lewis W. Clark, Matthew Laflin, Ebenezer Peck, Henry Brown, Albert G. Hobbie, John Wentworth, John Calhoun, Alonzo Huntington, Eri B. Hurlburt, Alson S. Sherman, William Gooding, Alexander Loyd, Edward B. Talcott, Azee Peck, Orin Sherman, Jesse H. Leavenworth, Henry Smith, Mahlon D. Ogden, David L. Gregg, Thomas Allen, and John Pearson. } Debt.

The plaintiffs having filed their declaration as follows, to wit: The United States of America, plaintiffs in this suit, by Justin Butterfield, their attorney, complain of Eli S. Prescott, William B. Ogden, Mark Skinner, James H. Woodworth, John W. Eldridge, Robert P. Woodworth, Albert G. Leary, Lewis W. Clark, Matthew Laflin, Ebenezer Peck, Henry Brown, Albert G. Hobbie, John Wentworth, John Calhoun, Alonzo Huntington, Eri B. Hulbert, Alson S. Sherman, William Gooding, Alexander Loyd, Edward B. Talcott, Azee Peck, Orin Sherman, Jesse H. Leavenworth, Henry Smith, Mahlon D. Ogden, David L. Gragg, Thomas Allen, and John Pearson, defendants in this suit, who were summoned of a plea that they render unto the said plaintiffs the sum of one hundred and fifty thousand dollars, which they owe to and unjustly detain from them. For that whereas, the said defendants, on the first day of October, in the year of our Lord one thousand eight hundred and forty, at the city of Chicago, in the district of Illinois aforesaid, and within the jurisdiction of this court, by their certain writing obligatory, sealed with their seals, and now to the court here shown, the date whereof is the same day and year aforesaid, by the names, contractions, abbreviations and descriptions of Eli S. Prescott, William B. Ogden, Mark Skinner, Jas. H. Woodworth, John W. Eldridge, Rob't P. Woodworth, Albert G. Leary, L. W. Clark, Mathew Laflin, E. Peck, Henry Brown, Albert G. Hobbie, John Wentworth, John Calhoun, Alonzo Huntington, Eri B. Hurlbert, Alson S. Sherman, Alexander Loyd, William Gooding, Edward B. Talcott, Azee Peck, O. Sherman, Jesse H. Levenworth,

Henry Smith, Mahlon D. Ogden, John Pearson, David L. Gregg, Thomas Allen, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the full and just sum of one hundred and fifty thousand dollars, money of the United States above demanded, and to be paid to the said plaintiffs when they the said defendants should be thereunto afterwards requested.

And the said plaintiffs, according to the statute in such case made and provided, say that the said writing obligatory was and is subject to a certain condition there underwritten, whereby, after reciting to the effect following, that is to say, that, whereas the President of the United States hath, pursuant to law, appointed the said Eli S. Prescott receiver of public moneys at Chicago, Illinois, and, in due form of law, caused to be issued to him as such a commission, bearing date the fourth day of March, anno domini one thousand eight hundred and thirty-nine, then, therefore, if the said Eli S. Prescott had truly and faithfully executed and discharged, and should truly and faithfully continue to execute and discharge, all the duties of said office, according to the laws of the United States, and moreover had well, truly and faithfully kept, and should well, truly and faithfully keep, safely, without loaning or using all the public money collected by him, or otherwise, at any time placed in his possession and custody, till the same had been or should be ordered by the proper department or officer of the Government, to be transferred or paid out, and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and should faithfully and promptly make, the same as directed, and had done, and should do and perform, all other duties, as fiscal agent of the Government, which have been or may be imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law, and also had done and performed, and should do and perform, all acts and duties required by law, or by direction of any of the executive departments of the Government, as agent for paying pensions, or for making any other disbursements which either of the heads of those departments might be required by law to make, and which were of a character to be made by a depository constituted by an act of Congress, entitled "An act to provide for the collection, safe keeping, transfer and disbursements of the public revenue," approved July 4, 1840, consistently with the other official duties imposed upon him, then the said obligation to be void and of none effect, otherwise it should abide and remain in full force and virtue; nevertheless, the said plaintiffs in fact say that, after making the said writing obligatory, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and forty-one, at Chicago, in the county of Cook and district aforesaid, the said Eli S. Prescott did not truly and faithfully execute and discharge the duties of his said office, according to the laws of the United States, in this, to wit, that, after the making of the said writing obligatory, there came into the hands of the said Eli S. Prescott, as receiver of

public moneys as aforesaid, a large sum of public moneys, belonging to the plaintiffs, received by the said Eli S. Prescott as receiver as aforesaid, to wit, the sum of one hundred thousand dollars, which it was the duty of the said Eli S. Prescott, as such receiver as aforesaid, to pay to the said plaintiffs. Yet the said Eli S. Prescott did not, nor would he, although often requested so to do, pay to the said plaintiffs the said sum of one hundred thousand dollars, so belonging to the said plaintiffs as aforesaid, and which came into the hands of the said Eli S. Prescott as receiver as aforesaid, or any part thereof, although often requested so to do; but the said Eli S. Prescott has hitherto wholly refused to pay the same, or any part thereof, to the said plaintiffs.

And for assigning a further breach of the condition of the said writing obligatory, the said plaintiffs further say, that after the making of the said writing obligatory, a large sum of public money, to wit, the sum of one hundred thousand dollars, belonging to the said plaintiffs, was collected by the said Eli S. Prescott, as receiver as aforesaid, to wit, on the first day of September, in the year one thousand eight hundred and forty-one, to wit, at Chicago, in the district aforesaid, which said sum of money, so collected as aforesaid, it was the duty of the said Eli S. Prescott to well, truly and faithfully keep safely, without loaning or using, till the same should be ordered by the proper department or officer of the Government to be transferred or paid out; and the said plaintiffs further say, that afterwards, to wit, on the fifteenth day of June, in the year one thousand eight hundred and forty-two, to wit, at Chicago, in the district aforesaid, the said Eli S. Prescott, so being accountable for and owing to the said plaintiffs the said money, received an order from the Secretary of the Treasury of the United States, ordering and requiring him to transfer and pay over the public moneys due by him to the United States, to Edward H. Hadduck, who was authorized to receive the same; nevertheless, the said Eli S. Prescott, when such order for transfer and payment as aforesaid, was received by him as aforesaid, did not faithfully and promptly make the said transfer and payment as directed, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory, but so to do neglected and refused, and ever since hath and still doth neglect and refuse so to do, or to account to the said plaintiffs for the said sum of money, or any part thereof.

And for assigning a further breach of the said condition of the said writing obligatory, the said plaintiffs further say, that after the making of the said writing obligatory, to wit, on the first day of September, in the year one thousand eight hundred and forty-one, to wit, at Chicago, in the district aforesaid, there was placed in the possession and custody of the said Eli S. Prescott, as receiver of public moneys as aforesaid, a large sum of the public moneys, belonging to the plaintiffs, to wit, the sum of fifty thousand dollars, which it was the duty of the said Eli S. Prescott well, truly and

faithfully to keep safely, without loaning or using, till the same should be ordered by the proper department, or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment should be received, should faithfully and promptly make the same as directed.

And the said plaintiffs in fact say, that afterwards, to wit, on the fifteenth day of June, in the year one thousand eight hundred and forty-two, *that* at Chicago, in the district aforesaid, the said money was ordered by the proper officer of the Government, to wit, the Secretary of the Treasury of the United States, to be transferred to Edward H. Hadduck, and the said order for the said transfer was then and there received by the said Eli S. Prescott; yet the said Eli S. Prescott, not regarding his duty in that behalf, when *when* said order for said transfer was so received by him as aforesaid, did not faithfully and promptly make the said transfer, as directed as aforesaid, according to the tenor and effect, true intent and meaning of the said condition of the said bond; but on the contrary, the said Eli S. Prescott wholly neglected and refused to make said transfer, and ever since hath and still doth refuse to make said transfer, as directed as aforesaid, contrary to the tenor and effect, true intent and meaning of the said condition of the said bond.

And for assigning a further breach of the said condition of the said writing obligatory, the said plaintiffs further say, that after the making of the said writing obligatory, to wit, on the first day of September, in the year one thousand eight hundred and one, to wit, at Chicago, in the district aforesaid, there came to the hands of the said Eli S. Prescott, as receiver of the public moneys, as aforesaid, a large sum of the public moneys belonging to the said plaintiffs, collected by the said Eli S. Prescott, as receiver as aforesaid, for lands sold by the said plaintiffs, of the public lands subject to sale at Chicago aforesaid, to wit, the sum of fifty thousand dollars, which it was the duty of the said Eli S. Prescott, well, truly and faithfully to keep safely, without loaning or using till the same should be ordered by the proper department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment should be received, faithfully and promptly make the same as directed; and the said plaintiffs in fact say, that afterwards, to wit, on the thirty-first day of May, in the year one thousand eight hundred and forty-two, to wit, at Chicago, in the district aforesaid, the said Eli S. Prescott was ordered by the proper officer of the Government, to wit, the Secretary of the Treasury of the United States, to pay over the said public moneys to Edward H. Hadduck, and the said order for the said payment was afterwards, to wit, on the fifteenth day of June, in the year last aforesaid, at the place aforesaid, presented by the said Hadduck to the said Prescott for payment. Yet the said Eli S. Prescott, not regarding his duty in that behalf, when the said order was so presented to him by the said Hadduck for payment as aforesaid, did not faithfully and promptly make payment of the same as directed as aforesaid, according to

the tenor and effect, true meaning and intent of the said condition of the said bond; but, on the contrary, the said Eli S. Prescott wholly neglected and refused to make payment of the same, or any part thereof, and ever since hath and still doth refuse to make said payment as directed as aforesaid, or any part thereof.

And for assigning a further breach of the said condition of the said bond or writing obligatory as aforesaid, the said plaintiffs further say, that, after the making the said writing obligatory, to wit, on the first day of August, in the year one thousand eight hundred and forty-one, to wit, at Chicago, in the district aforesaid, there was placed in the possession and custody of the said Eli S. Prescott, as receiver of public moneys as aforesaid, and designated a depository constituted by an act of Congress, entitled "an act to provide for the collection, safe keeping, transfer, and disbursement of the public revenue," approved July 4, 1840, a large sum of the public moneys belonging to the said plaintiffs, to wit, the sum of one hundred thousand dollars; and the said Eli S. Prescott so having the said sum of money in his custody and possession as aforesaid, afterwards, to wit, on the fifteenth day of June, in the year one thousand eight hundred and forty-two, at Chicago, in the district aforesaid, received an order in writing from the Secretary of the Treasury of the United States, bearing date the twenty-first day of May, in the year one thousand eight hundred and forty-two, directed to Eli S. Prescott, late receiver of public moneys at Chicago, Illinois, (the said Eli S. Prescott one of the defendants in this suit, meaning,) by which said order the said Eli S. Prescott was thereby ordered and required to transfer and pay over the public moneys due by him (the said Prescott, meaning) to the United States to Edward H. Hadduck, who was authorized to receive the same. Nevertheless, the said Eli S. Prescott, not regarding his duty in that behalf when the said order was so received by him as aforesaid, neglected and refused to transfer and pay over the said public moneys so due by him to the United States as aforesaid, to the said Edward H. Hadduck as aforesaid, although then and there requested by the said Hadduck to transfer and pay over to him the same, in pursuance of the said order; and the said Eli S. Prescott ever since hath and still doth neglect and refuse so to do, or to account to the said plaintiffs for the same. By reason of which said breaches the said writing obligatory became forfeited, and thereby an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the said sum of one hundred and fifty thousand dollars above demanded; yet the said defendants, although often requested so to do, have not as yet paid the said sum of one hundred and fifty thousand dollars above demanded, or any part thereof, to the said plaintiffs, but to pay the same to them have hitherto wholly refused, and still do refuse to pay the same, or any part thereof, to the said plaintiffs, to the damage of the said plaintiffs of twenty thousand dollars, and thereof they bring suit.

J. BUTTERFIELD, *U. S. Atty.*

And the defendants having filed their pleas, numbered three, four, and five, to wit:

3. And for a further plea in this behalf, the said defendants say actio non, because they say that the said Eli S. Prescott, before the commencement of this suit, did pay to the said plaintiff all moneys which came into his hands as receiver of public moneys, excepting the sum of twelve thousand eight hundred and fifteen dollars; and the said defendants aver that the said Eli S. Prescott tendered to the said plaintiff the sum of one hundred and twenty-seven dollars before the commencement of this suit; and the said defendants aver that whilst the said Eli S. Prescott had said money in his possession, and before the commencement of this suit, some person or persons, to said defendants unknown, feloniously did steal, take, and carry away from the possession of the said Eli S. Prescott the sum of eleven thousand six hundred and eighty-eight dollars, part and parcel of said money received by the said Eli S. Prescott as receiver of public moneys, although the said Eli S. Prescott used ordinary care and diligence in the safe keeping of the same, and this they are ready to verify, wherefore they pray judgment, &c.

4. And for a further plea in this behalf as to the first, second, and fifth breaches in said declaration assigned, the said defendants say actio non, because they say, at, &c.; and the said Prescott had not received the sum of one hundred thousand dollars in manner and form as aforesaid in the first, second, and fifth alleged breaches of said writing obligatory, but the said defendants in fact say that the said Eli S. Prescott had received the sum of eleven thousand six hundred and eighty-eight dollars belonging to the said plaintiffs, and that some person or persons, to said defendants unknown, feloniously did steal, take, and carry the same away from the possession of the said Eli S. Prescott, without any fault or negligence of the said Eli S. Prescott. And the said defendants aver that the said Eli S. Prescott did use ordinary care and diligence in keeping said money and to protect the same from being stolen, and this they are ready to verify; wherefore they pray judgment, &c.

5. And the said defendants, for a further plea in this behalf as to the third and fourth breaches of the said writing obligatory in said declaration contained, say actio non, because they say that the said Eli S. Prescott had not received the sum of fifty thousand dollars in manner and form as the same is charged in said third and fourth breaches of said writing obligatory in said declaration assigned, but the said defendants in fact say that the said Eli S. Prescott had received the sum of eleven thousand six hundred and eighty-eight dollars belonging to the said plaintiff, and that some person or persons, to these defendants unknown, feloniously did steal, take, and carry the same away from the custody of the said Eli S. Prescott, without any fault or negligence of the said Eli S. Prescott. And the said defendants aver that the said Eli S. Prescott did use ordinary